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No. 305

In the Supreme Court of the United States

OCTOBER TERM, 1951

WALTER L. [illegible], PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 96

WALTER L. AND HELEN MORGAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. 23–39) is reported at 33 T.C. 30. The opinion of the Court of Appeals (Pet. 41–53) is reported at 288 F. 2d 676.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1961. (Pet. 54.) A petition for rehearing was denied on April 13, 1961. (Pet. 55.) The petition for a writ of certiorari was filed on May 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

All of the assets of a corporation of which taxpayer was the sole stockholder, except cash and Gov-

ernment bonds constituting accumulated earnings, were transferred to another corporation of which taxpayer was also the sole stockholder; the accumulated earnings were distributed to taxpayer; and the transferee corporation continued to carry on the business of the transferor corporation. The question is whether the distribution of the earnings to taxpayer was made pursuant to a plan of reorganization, had the effect of a taxable dividend, and was taxable as such under Section 112(c)(2) of the Internal Revenue Code of 1939 despite the fact that additional stock in the transferee corporation (all of whose stock taxpayer already owned) was not formally issued in exchange for the transferred assets.

STATUTE INVOLVED

The pertinent provisions of Sections 112 and 115 of the Internal Revenue Code of 1939 are set forth in Appendix, *infra*, pp. 12–16.

STATEMENT

The taxpayer[1] owned 100 percent of the outstanding stock and was president and chairman of the board of directors of the Wellington Corporation (the "Corporation") and of W. L. Morgan & Company (the "Company"). He was also the president and chairman of the board of directors of the Wellington Fund, Inc. (the "Fund"). The Fund is an open-end investment company conducting a balanced mutual fund. For about 20 years prior to April 12,

[1] Walter L. Morgan will be referred to as the sole taxpayer. His wife, Helen Morgan, is a party only because a joint return was filed.

1952, the Corporation had provided investment advisory service to the Fund, and the Company had served as the national sponsor or underwriter, promoter and distributor of the Fund's stock. (Pet. 24–25.)

The Corporation reported income of $305,175.96 for its fiscal year ended May 31, 1951. No dividends were paid during the fiscal year. During late 1951 and early 1952, an internal revenue agent examining the Corporation's return discussed the imposition of a surtax upon the accumulated earnings with several representatives of the Corporation. These discussions resulted in a preliminary formal conference on February 11, 1952, between representatives of the Corporation and the Government, but no agreement was reached. (Pet. 29.)

On February 27, 1952, the board of directors of the Fund approved an investment advisory contract with the Company and submitted the agreement for the approval of the stockholders of the Fund at their annual meeting on April 9, 1952. The agreement was approved by a majority of the stockholders and was entered into by the Fund and the Company on April 12, 1952. (Pet. 29.) From that date, the Company—which changed its name to the Wellington Company—not only has continued to serve the Fund as national sponsor or underwriter, promoter and distributor of stock, but has supplied to the Fund the investment advisory service formerly provided by the Corporation. (Pet. 24–25.)

The Corporation failed to obtain sufficient new business to replace its contract with the Fund; ac-

cordingly, on May 27, 1952, the board of directors of the Corporation, upon the written consent of the taxpayer, its sole stockholder, resolved to liquidate. Following the adoption of the liquidating resolution, the Corporation sold its office furniture and equipment to the Company for a price set by the Company's firm of accountants as its fair market value. The Corporation also transferred to the Company possession of, access to, and the right to make use of its investment, statistical, and research material, if not title thereto, without consideration of any kind. (Pet. 30.) The Company previously had taken over all of the employees of the Corporation, together with the employees' profit-sharing plan. (Pet. 46.)

Pursuant to the liquidating resolution of the Corporation's board of directors, the following distributions were made to the taxpayer:

May 27, 1952—Cash	$100,000.00
June 1, 1952—U.S. Treasury Bonds	48,906.25
September 18, 1952—Cash	65,244.74
Total	214,150.99

The Corporation's accumulated earnings and profits at the time of these distributions were at least $212,150.99. Upon completion of the distribution, the taxpayer delivered his preferred and common shares to the Corporation for cancellation, and, on September 24, 1952, the State of Delaware issued a certificate of dissolution. (Pet. 30–31.)

In their joint tax return for the calendar year 1952, taxpayer and his wife reported the gain of $212,150.99 from the distribution ($214,150.99, less cost of stock, $2,000) as a long-term capital gain, on

the theory that it was realized from a liquidation of the enterprise and was therefore taxable as capital gain under Section 115(c) of the Internal Revenue Code of 1939. The Commissioner determined a deficiency on the ground that the gain was taxable as a dividend under Section 112(c)(2). (Pet. 31.) The Tax Court sustained the taxpayer. (Pet. 32–37.) The Court of Appeals (Judge Hastie dissenting) reversed. (Pet. 41–53.)

ARGUMENT

The decision below is correct. There is no conflict, or any other occasion for further review.

1. Section 112(c)(2) of the 1939 Code, Appendix, *infra*, p. 13, requires a corporate distribution to a stockholder to be taxed as a dividend rather than as a capital gain if it (1) is in pursuance of a plan of reorganization, (2) has the effect of a taxable dividend, and (3) is within the provisions of Section 112(c)(1). The focal point in this litigation is whether Section 112(b)(3), the provision triggering the operation of Section 112(c)(1), requires a formal exchange of stock for stock.[2] Despite its find-

[2] Section 112(a) states the general rule that upon the sale or exchange of property the entire amount of the gain shall be recognized, subject to enumerated exceptions. Section 112(b)(3) constitutes one of the exceptions. It provides that no gain or loss shall be recognized if, pursuant to a plan of "reorganization," stock is "exchanged solely for stock" between corporations which are parties to the reorganization. Section 112(g)(1)(D) defines a "reorganization" as including a "transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to

ing that taxpayer held a 100 per cent stockholder interest in both the transferor Corporation and the transferee Company, and its assumption that a reorganization existed under Section 112(g)(1)(D), the Tax Court reasoned that, since no new stock was formally issued by the Company to taxpayer, no exchange took place but only a liquidation distribution

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which the assets are transferred." Under Section 112(h) "control" means at least 80 per cent stock ownership.

Section 112(c)(1) provides that if an exchange would be within the non-recognition provisions of subsection (b)(3) were it not for the fact that the property received in exchange consists not only of stock, but also of other property or money ("boot"), then the gain shall be recognized in an amount not exceeding the "boot".

Section 112(c)(2) provides that if a distribution pursuant to a plan of reorganization is within the provisions of Section 112(c)(1) but "has the effect of the distribution of a taxable dividend", then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under Section 112(c)(1) as is not in excess of his ratable share of the undistributed earnings of the corporation.

A "dividend" is broadly defined in Section 115(a) as any distribution by a corporation to its shareholders out of current or accumulated earnings. This definition is "infused" into Section 112(c)(2), and, accordingly, "a distribution, pursuant to a reorganization, of earnings and profits 'has the effect of a distribution of a taxable dividend' within Section 112(c)(2)." *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 292. See also *Bazley* v. *Commissioner*, 331 U.S. 737, 743.

Section 115(c) provides that amounts distributed in complete or partial liquidation of a corporation shall be treated as in full or partial payment in exchange for the stock, and Section 115(i) defines a partial liquidation. However, these provisions govern liquidation distributions "apart from reorganizations", and "do not apply to a situation arising within § 112." *Commissioner* v. *Estate of Bedford*, *supra*, p. 291. See also *Lewis* v. *Commissioner*, 176 F. 2d 646 (C.A. 1); *Love* v. *Commissioner*, 113 F. 2d 236 (C.A. 3).

of money. (Pet. 23–39.) The Court of Appeals, reversing the Tax Court, refused to permit the form of the transaction to obscure the essential nature of the arrangement. As noted by the appellate court, the so-called liquidation distribution to taxpayer unquestionably would have been taxable as a dividend under Section 112(c)(2) had the Corporation's non-cash assets been transferred to a newly-created corporation in exchange for the latter's stock, and the fact that an existing corporation of which taxpayer already was the sole stockholder was utilized for the same purpose and in the same way—thus obviating the need for a formal exchange of his Corporation stock for new Company stock—did not alter the practical effect of what was done. The taxpayer's 100 per cent stockholder interest in the successor corporation was precisely the same, in substance, whether or not additional shares were issued to him. The Court of Appeals accordingly correctly rejected the taxpayer's contention that the distribution of the Corporation's accumulated earnings was a liquidation distribution resulting in capital gain under Section 115(c), and held that it represented "boot" received in a non-taxable exchange under Section 112 (b)(3), pursuant to a reorganization under Section 112(g)(1)(D), taxable as a dividend under Section 112(c)(2). (Pet. 41–49.)

The court below did not, as taxpayer assumes throughout his petition, indulge in "judicial legislation" by dispensing with the "exchange" requirement of the statute. On the contrary, properly looking

through form to the substance and effect of the entire transaction, it concluded that there was an "exchange" within the meaning of the statute.[3]

2. Neither the result reached by the Court of Appeals nor its reasoning is in conflict with any other decision. On the contrary, there are at least two other courts which have held that Section 112(b)(3) applies where there is no actual or formal exchange of stock for stock, but a reorganization exists. *Liddon* v. *Commissioner,* 230 F. 2d 304 (C.A. 6), certiorari denied, 352 U.S. 824; *Heller* v. *Commissioner,* 147 F. 2d 376 (C.A. 9), certiorari denied, 325 U.S. 868. As pointed out by the Court of Appeals (Pet. 49), even the pair of Tax Court decisions upon which taxpayer relies (Pet. 10) are inapposite, since in neither of them did the court conclude that a reorganization existed. *Cramer* v. *Commissioner,* 20 T.C. 679; *Trianon Hotel*

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[3] In the words of the court below (Pet. 47–48):

> As we noted earlier, the Tax Court held that there must be an actual physical exchange of stock before the distribution here could be taxable as dividend income. With this conclusion we cannot agree, for it is contrary to the purposes that Congress meant to serve in enacting subsections 112(b) and (c)(2).
>
> * * * * *
>
> If the transferor's assets had been transferred to a newly formed corporation in exchange for stock, there is no question that the boot would have been taxable as dividend income. That an existing corporation in which the taxpayer was the sole shareholder was used instead of a newly formed one cannot alter the true nature of the transaction. Here, the issuance of new stock would have been a meaningless gesture since the stock the taxpayer already held represented the total value of all the assets except for the boot.

Co. v. *Commissioner,* 30 T.C. 156. The Court of Appeals adhered to the established principle that in applying the reorganization provisions of the taxing statute, the transaction must be viewed as a whole, from beginning to end, in order that tax significance may be given to its substance rather than its form. *Helvering v. Limestone Co.,* 315 U.S. 179. See also *Gregory* v. *Helvering,* 293 U.S. 465, and *Minnesota Tea Co.* v. *Helvering,* 302 U.S. 609. More importantly, the result reached by the Court of Appeals, preventing, as it does, the use of the reorganization section to escape taxation by distribution as capital gains of what are in effect dividends out of earnings, is in accord with the announced purpose of Congress when it originally enacted Section 112(c)(2) as Section 203(d)(2) of the Revenue Act of 1924, 43 Stat. 253. See S. Rep. No. 398, 68th Cong., 1st Sess., p. 7 (1939–1 Cum. Bull. (Part 2) 266, 271). Accordingly, there is no issue of general importance involved in this case requiring further review by this Court.

3. Taxpayer suggests that further review is justified because the appellate court's construction of Section 112(b)(3) conflicts with the opinions of some private practitioners and writers, particularly a group advising the House Ways and Means Committee in 1957 with respect to proposed changes in the 1954 Code. (Pet. 9–10.) Since even "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (*United States* v. *Price,* 361 U.S. 304, 313), the views of a group of lawyers submitted to—but not acted upon by—a committee of a

subsequent Congress certainly are not authoritative as to the intent of the earlier Congress.[4] Although taxpayer represents (Pet. 7, 10) that "tax authorities" assume that an actual formal exchange of stock is required, he acknowledges that a "conceptual exchange of stock" (Pet. 7) would satisfy the requirements of the statute.

4. There is no merit to taxpayer's contention that the case should be remanded to the Tax Court for purposes of making a finding as to the existence of a reorganization. (Pet. 14–16.) Although the Tax Court only assumed *arguendo* that there was a reorganization, it expressly found that part of the assets of the Corporation was transferred to the Company (Pet. 30) and that taxpayer owned 100 per cent of the stock in both (Pet. 25), and those facts alone are sufficient to establish a reorganization under Section 112(g)(1)(D). As the Court of Appeals stated, "a chronological statement of the facts in the record, uncontradicted, largely stipulated and as found by the Tax Court, leads irresistibly to the conclusion that the distributions here were made in pursuance of a plan of reorganization." (Pet. 43.)

Moreover, the legal theory on which taxpayer challenges the existence of a reorganization rests upon

[4] Moreover, there is no good reason to assume that the proposed revision as adopted would have changed, rather than clarified, existing law. Indeed, the very portion of the advisory report quoted by taxpayer (Pet. 9–10) states that the existing boot provisions "literally" do not cover a case like the present, but suggests that literal compliance should not be necessary. Concededly, under the proposed revision the decision below would be correct.

the mistaken notion that Section 112(g)(1)(D) is inapplicable where only some of the assets of a corporation are transferred to another. The Court below correctly pointed out that (Pet. 46–47) "the subsection involved requires only that a part of the assets be transferred." See *Becher* v. *Commissioner*, 221 F. 2d 252 (C.A. 2); *Lewis* v. *Commissioner*, 176 F. 2d 646 (C.A. 1); 3 Mertens, *Law of Federal Income Taxation* (1957), Sec. 20.91.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.

APPENDIX

Internal Revenue Code of 1939, as amended (26 U.S.C., 1952 ed.):

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange

by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(c) *Gain From Exchanges Not Solely in Kind.*—

(1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5), or within the provisions of subsection (l), of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (l) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

* * * * *

(g) *Definition of Reorganization.*—As used in this section (other than subsection (b)(10) and subsection (l)) and in section 113 (other than subsection (a)(22))—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B)

the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded, or (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (E) a recapitalization, or (F) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control.*—As used in this section the term "control" means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its

shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

* * * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

(g) *Redemption of Stock.*—

(1) *In general.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a dis-

tribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 96.

WALTER L. and HELEN MORGAN,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING AND PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 96.

WALTER L. AND HELEN MORGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE OUT OF TIME A PETITION FOR REHEARING.

Come now Walter L. and Helen Morgan, by their attorneys, and move this Honorable Court for leave to file out of time a Petition for Rehearing, annexed hereto, and as grounds therefor assign the following:

1. On October 9, 1961, this Court entered an order denying Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing a decision of the Tax Court of the United States. *Walter L. and Helen Morgan v. Commissioner of Internal Revenue* (October Term, 1960, No. 974).

2. Subsequent to the denial by this Court of Petition for Writ of Certiorari, and subsequent to the last day prescribed by Rule 58(2) of this Court to file a Petition for Rehearing, this Court, on November 15-16, 1961, heard argument in the case of *Turnbow v. Commissioner of Internal Revenue* (October Term, 1961, No. 60) and, on December 18, 1961, entered its decision in the *Turnbow* case, — U. S. —, 82 S. Ct. 353.

3. The decision of the Court of Appeals for the Third Circuit to whom this Court denied a Writ of Certiorari is in direct conflict with the decision of this Court in *Turnbow*. The principal question in this case (*Morgan*) is whether the Court of Appeals for the Third Circuit erred in holding that, even without any demonstrable "exchange" of like-kind property, Section 112(c)(2) of the Internal Revenue Code of 1939 is nevertheless applicable if the given business objective of the reorganization can be accomplished with or without an exchange. The decision of this Court in the *Turnbow* case explicitly states that an *actual* exchange is required in order that Section 112(c)(2) be applicable to a reorganization. The Tax Court of the United States so held in this case (*Morgan*) but was reversed by the Court of Appeals for the Third Circuit. The view of the Court of Appeals for the Third Circuit and that of this Honorable Court are irreconcilable.

4. The argument was heard and the decision entered in the *Turnbow* case after the time for filing Petition for Rehearing in this case prescribed by Rule 58(2) of this Court had expired. Diligent effort has been made subsequent to the *Turnbow* decision to file this motion and Petition for Rehearing.

5. Although Rule 58 of this Court requires petitions for rehearing to be filed within 25 days of an order on petition for writ of certiorari, this Court has held that any finality of litigation as expressed under Rule 58, under which petitions for rehearing that are out of time will not be received, must yield where the interests of justice would make unfair the strict application of that rule. *United States v. Ohio Power Co.*, 353 U. S. 98 (1957) reh. den. 353 U. S. 977 (1957). This is particularly true where, as here, the petition is based on "grounds which are confined to intervening circumstances of substantial or controlling effect" (Rule 58(2)).

WHEREFORE, petitioners move this Honorable Court for leave to file Petition for Rehearing, annexed hereto, notwithstanding the expiration of the prescribed period for such filing.

WILLIAM R. SPOFFORD,

ANDREW B. YOUNG,
Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 96.

WALTER L. AND HELEN MORGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, on the grounds following, petition for rehearing of the order of this Court denying petitioners' Petition for Writ of Certiorari:

1. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Turnbow v. Commissioner of Internal Revenue.* As stated in the Petition for Certiorari, the principal question in this case is as follows:

> "1. Section 112(c)(2) of the Internal Revenue Code of 1939 by explicit statutory provision is made applicable only to corporate reorganization transactions involving 'exchanges' of so-called 'like-kind' property. Assuming *arguendo* a corporate reorgani-

zation, the question presented is whether the Court of Appeals for the Third Circuit erred in holding that *even without any demonstrable* 'exchange' of like-kind property Section 112(c)(2) is nevertheless applicable if the given business objective of the reorganization can be accomplished with or without an exchange."

The Court of Appeals for the Third Circuit held that Section 112(c)(1) and (2) of the Internal Revenue Code of 1939 should apply in this case even though there was no *actual* "exchange" of so-called "like-kind" property. As stated in the majority opinion of Judge Staley (Pet. for Writ of Cert. p. 47):

> "As we noted earlier, the Tax Court held that there must be an actual physical exchange of stock before the distribution here could be taxable as dividend income. With this conclusion we cannot agree, for it is contrary to the purposes that Congress meant to serve in enacting subsections 112(b) and (c)(2)."

In his dissenting opinion, Judge Hastie stated (Pet. for Writ of Cert. pp. 50, 52-53):

> ". . . It is argued, however, that in this case no transfer of stock of a corporation to the taxpayer is the legal equivalent of an actual stock transfer merely because the taxpayer already was and long had been sole stockholder of that corporation. I can see no logical basis for thus finding an exchange of stock within the statutory requirement without any demonstration that something happened in this case which was equivalent to a transfer of stock to the taxpayer."
>
> • • •
>
> "In these circumstances, I do not see how it can be said in any meaningful way that there was in this case even a conceptual exchange of stock, and, of course, there was not a real one. Therefore, Section

112(c) is inapplicable and the decision of the Tax Court should be affirmed."

In the case of *Turnbow v. Commissioner of Internal Revenue*, — U. S. —, 82 S. Ct. 353, 357 (1961), this Court, speaking through Mr. Justice Whittaker, stated:

> "We are also agreed that § 112(c)(1) can apply only if the exchange actually consists *both* of 'property permitted by [subsection (b)(1), (2), (3), or (5), or subsection (1) of § 112] . . . to be received without the recognition of gain' *and* 'other property or money.' And we think it is clear that the 'property permitted by [§ 112(b)(3)] . . . to be received without the recognition of gain' is 'stock or securities in . . . a party to a reorganization,' 'in pursuance of [a] plan of reorganization,' and 'for stock . . . in such corporation or in another corporation [which is] a party to the reorganization.' Since, as is admitted, none of the property involved in this exchange actually met that description, none of it was 'property permitted by [§ 112(b)(3)] . . . to be received without the recognition of gain,' and therefore § 112(c)(1) does not apply to postpone recognition of petitioner's gain from the Foremost stock.
>
> This, of course, is not to say that § 112(c)(1) is without purpose or function. It is to say only that it does not apply unless some part, at least, of the property exchanged *actually* meets the particular description contained in the applicable section or subsection of the Code."

It is submitted that the decision of the Court of Appeals in the instant case holding that no *actual* exchange of "like-kind" property is required in order to come within Section 112(c), is in conflict with the statement of this court above quoted from the *Turnbow* decision, particularly where Mr. Justice Whittaker saw fit to italicize the

words "both" and "and" in the first sentence above-quoted and use the word "actually" three times.

WHEREFORE, it is respectfully requested that this petition for rehearing be granted, the petition for writ of certiorari granted, the decision of the Court of Appeals for the Third Circuit reversed, and the decision of the Tax Court of the United States affirmed. Alternatively, it is requested that this petition for rehearing be granted and that the petition for writ of certiorari be granted and the case listed for argument.

Respectfully submitted,

WILLIAM R. SPOFFORD,

ANDREW B. YOUNG,
Counsel for Petitioners.

Certificate.

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

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ANDREW B. YOUNG,
Counsel for Petitioners.